Indian Claims Commission

Sumas Inquiry

Report On: Indian Reserve #6
Railway Right of Way Claim

FEBRUARY 1995

Indian Claims Commission

Commission des revendications des Indiens

February 22, 1995

Chief Lester Vernon Ned
Sumas First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

RE: Sumas "Railway Right of Way" Claim

On January 24, 1994, the Commission agreed to conduct an inquiry, pursuant to the *Inquiries Act*, into the claim of the Sumas Band. The claim concerns a railway right of way across Sumas Indian Reserve No. 6, which was expropriated in 1910. When the railway line was abandoned in 1927, the Band was permitted to purchase a third of the right of way. The rest was sold to non-Indian third parties and has remained in the hands of non-Indians to date.

The Commission has conducted an inquiry into the rejection of the Band's claim by Canada. The issues are complex, but the essence of the matter is whether the Band retained any legal interest in the right of way, and whether Canada had a lawful obligation to restore the expropriated land to the Band when the railway discontinued its line.

The Commission has reviewed over 600 pages of documents in the course of conducting this inquiry. In addition, the Commission held a community session on September 23, 1994, at Sumas First Nation, where the panel of Commissioners on this inquiry heard from elders and representatives of the First Nation. The Commissioners also considered written submissions and heard oral submissions on September 23, 1994, from counsel for the First Nation and from counsel for Canada on the question of whether the claimants have a valid claim for negotiations pursuant to Canada's Specific Claims Policy.

Éd Enterprise Building, Suite 400 - 427 ouest, av. Laurier Ave. West
P.O. Box/C.P. 1750, Station/Succursale "B", Ottawa, Canada K1P 1A2
Tel (613) 943-2737 Fax (613) 943-0157

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Our review of the history of this claim, and our analysis, conclusions and recommendation are contained in the attached report which we are honoured to present to you on this date.

FOR THE INDIAN CLAIMS COMMISSION

Commissioner Daniel Bellegarde

Commissioner Carole Corcoran

Commissioner James Prentice, QC

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE SUMAS BAND

PANEL

Commissioner Daniel Bellegarde
Commissioner Carole T. Corcoran
Commissioner James Prentice, QC

COUNSEL

For the Sumas Band
Leslie Pinder / Clarine Ostrove

For the Government of Canada
Bruce Becker / Louise Senechal

To the Indian Claims Commission
Kim Fullerton / Robert F. Reid, QC / Diana Belevsky

February 1995

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PART I

INTRODUCTION

On January 24, 1994, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the claim of the Sumas Band.[1] The claim concerns a railway right of way across Sumas Indian Reserve No. 6 which was expropriated in 1910. The railway company used the right of way until 1927, when it abandoned the line. At that time, Chief Ned of the Sumas Band wrote to the Indian Agent asking that the Band be allowed to reacquire the land taken. The Band was permitted to purchase only a third of the right of way, and the rest was sold to non-Indian third parties. This land has remained in the hands of non-Indians.

In March 1984, the Sumas Band submitted a specific claim to the Department of Indian and Northern Affairs.[2] Under the government's Specific Claims Policy, published in 1982, claims that disclose an outstanding lawful obligation on the part of the federal government would be accepted for negotiation.[3] The Band's position

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1 Harry S. LaForme, then Chief Commissioner, to Chief and Council, Sumas First Nation, and to the Ministers of Justice and Indian and Northern Affairs, January 24, 1994 (ICC Exhibit 4).

2 Submission of the Sumas Band, March 30, 1984 (ICC Exhibit 3, attachment).

3 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*]. On page 20, the pamphlet specifies:

> A lawful obligation may arise in any of the following circumstances:
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

was that the *Railway Act* and the *Indian Act* permitted the railway company to acquire only a limited interest in Indian lands; thus, the right of way should have been restored to reserve status when it was no longer used for railway purposes. Additional legal arguments in support of the claim were submitted in 1986.[4] Indian and Northern Affairs rejected the claim in 1988, on the basis that the expropriation had terminated the Indian interest in the right of way, and therefore the government had no legal obligation to restore it to reserve status.[5] The Band's subsequent efforts to have the matter reconsidered were unsuccessful.[6] By letter dated September 16, 1993, counsel for the Sumas Band requested that the Commission conduct an inquiry into the rejection of its claim.[7]

The function of this Commission is to assist First Nations and Canada in the resolution of specific claims. Our mandate provides, in part:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the

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iv) An illegal disposition of Indian land.

[4] Leslie Pinder, counsel for the Band, to Manfred Klein, Senior Negotiator, BC, Indian and Northern Affairs Canada, June 6, 1986 (ICC Documents, pp. 534-42).

[5] Manfred Klein, Indian and Northern Affairs Canada, to Leslie Pinder, August 11, 1988. See also letter from Manfred Klein to Leslie Pinder, June 20, 1985, setting out the Department of Justice's legal opinion on this claim. ICC Exhibit 2.

[6] Leslie Pinder to Manfred Klein, July 29, 1992 (ICC Documents, pp. 581-83). At a meeting on January 7, 1993, with Specific Claims West, DIAND, the Band was advised orally that the claim would not be accepted for negotiation; Leslie Pinder to Donna Gordon, October 20, 1993.

[7] Leslie Pinder to Chief Commissioner LaForme, September 16, 1993 (ICC Exhibit 3).

> Policy where that claim has already been rejected by the Minister; . . .[8]

Thus, our task here is to examine the claim of the Sumas Band and to assess its validity on the basis of the Specific Claims Policy. In other words, the question before us is whether Canada has an outstanding lawful obligation, as defined in the Policy, toward the Sumas Band. This report sets out our findings and recommendations to the claimant First Nation and to the government.

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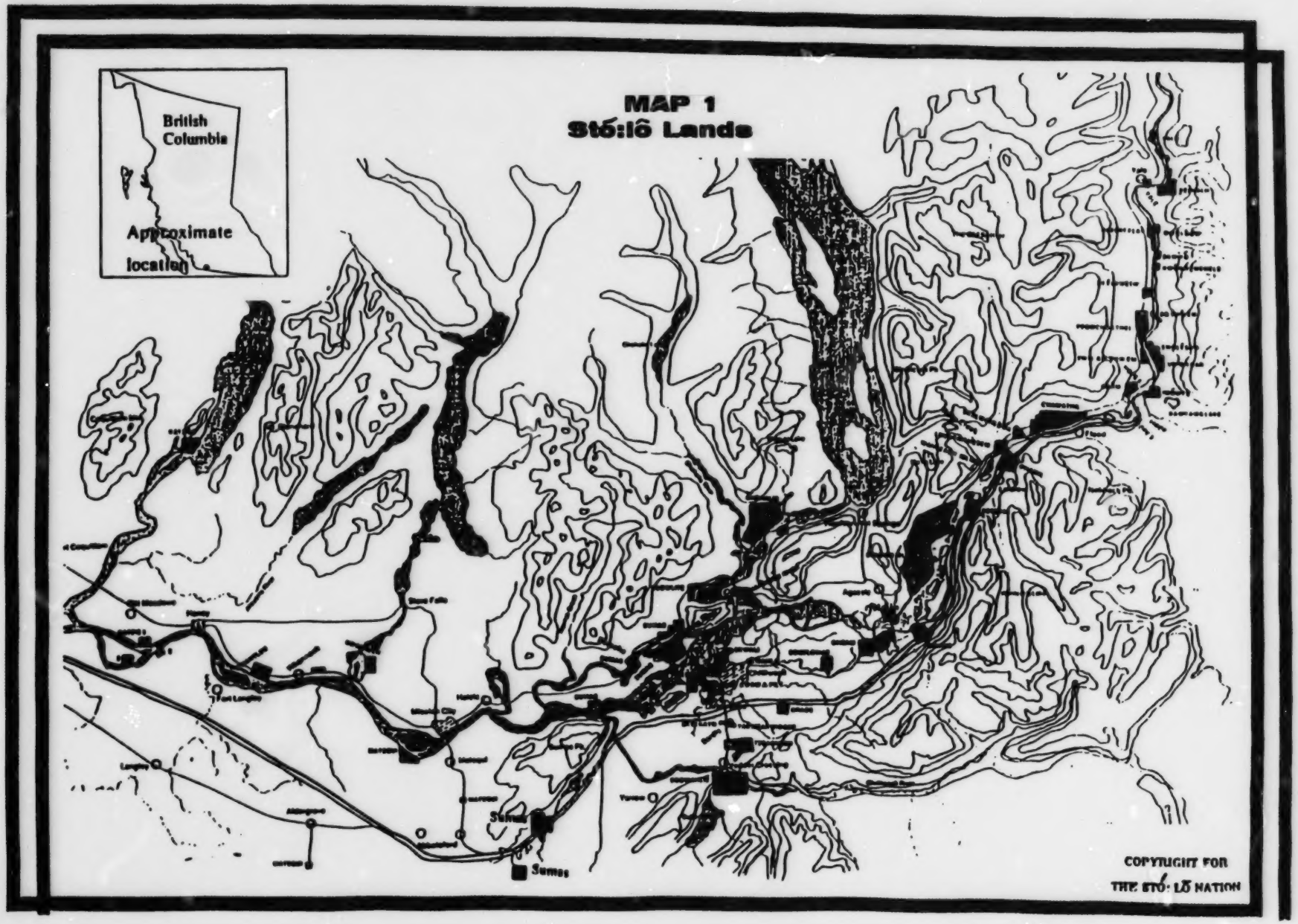
[8] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730 (July 27, 1992), amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329 (July 15, 1991) (ICC Exhibit 1).


MAP 1
Stó:lō Lands
British Columbia
Approximate location
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PART II

THE INQUIRY

In this section of the report, we examine the historical evidence relevant to the claim of the Sumas Band. We considered an extensive documentary record, the knowledge of the elders, which was shared with the Commission at an information-gathering session held in the community on September 23, 1994, and the balance of the record of this Inquiry. Details of the inquiry process and the formal record are set out in Appendix A to this report.

BACKGROUND

The Sumas Band is part of the Stó:lō Nation, a division of the Coastal Salish language group, whose traditional lands are in British Columbia between Fort Langley and Yale. Map 1 shows the Stó:lō lands. Stó:lō means "the river people"; the literal translation of Sumas is "a big level opening."

By decision dated May 15, 1879, Indian Reserve Commissioner G.M. Sproat established seven reserves for the "Somass River Indians."[9] In 1946 members of the Sumas Band signed a declaration stating that they had no interest in Reserves Nos. 1 to 5: "We own only Reserve No. 6, as Reserve No. 7 was sold some years ago." (IR No. 7 was sold to the Soldier Settlement Board in 1919.) Reserves 1 to 5 were taken up by the Lakahahmen Band, and in 1953 an Order in Council was passed

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[9] Decision of G.M. Sproat, Indian Reserve Commissioner, May 15, 1879 (ICC Documents, pp. 1-2).

confirming the various reserves to the two separate Bands.[10]

THE VV & E RIGHT OF WAY

The Vancouver, Victoria and Eastern Railway and Navigation Company (VV & E), a subsidiary of the Great Northern Railway Company located in Seattle, Washington, was incorporated by an Act of the British Columbia legislature in 1897. Its mandate was "to construct, equip and operate a line of railway from some point of Burrard Inlet or English Bay to New Westminster; thence eastward through the valley of the Fraser River and the southern part of British Columbia, by the most direct and feasible route, to the town of Rossland . . ."[11]

Sometime during the first quarter of 1910, VV & E began construction on that part of its line from Abbotsford to Kilgard. In response to an inquiry from Chief Ned of the Sumas Band in March 1910, Indian Agent R.C. McDonald stated that his office had not yet received an application from the railway company for a right of way through the reserve, but he assured the Chief "that the company cannot do any construction work on the reserve until they receive permission from the Department at Ottawa."[12] On July 5, 1910, F.S. and J.C. Maclure applied for land on the Sumas

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[10] Declaration of Sumas Band, October 1, 1946, and Declaration of Lakahahmen Band, November 1, 1946, National Archives of Canada [hereinafter NA], RG 10, vol. 7326, file 987/20-7-11-5, pt. 1; Memorandum from Minister of Citizenship and Immigration to the Governor General in Council, August 24, 1953, DIAND file 987/30-0, vol. 1 (ICC Exhibit 5, tab 1).

[11] Petition of Wm. Templeton, Wm. Nicol, and John T. Bethune to British Columbia Legislative Assembly, Victoria, BC, February 17, 1897, BC, Legislative Assembly, *Journals*, 1897 (ICC Documents, p. 17).

[12] Indian Agent R.C. McDonald, Department of Indian Affairs, New Westminster, BC, to Chief Ned, Sumas Band, March 21, 1910 (ICC Documents, p. 44).

Reserve to construct a clay brick and pipe factory; the location of this factory was directly linked to the railway line, and the right of way was indicated on the plan submitted to the Department of Indian Affairs with the Maclures' application.[13] Later that month, VV & E forwarded survey plans to Indian Affairs showing a 41.95-acre railway right of way across Sumas IR No. 6, along with a request to "allow the Company to proceed with the work at once."[14]

In a memorandum to the Governor in Council on July 26, 1910, the Superintendent General of Indian Affairs noted that the Chief Engineer of the Department of Railways and Canals had certified that "the lands applied for are actually required for railway purposes and are such as the Company should be allowed to acquire under section 46 of the Indian Act."[15] Section 46 of the *Indian Act* provided: "No portion of any reserve shall be taken for the purposes of any

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[13] Bowser Reid & Wallbridge, solicitors for the Maclures, to Secretary, Department of Indian Affairs, July 5, 1910 (ICC Documents, pp. 55-56). By resolution dated December 19, 1910, and by Surrender for Lease on February 20, 1911, the Sumas Band consented to a 21-year lease to the Maclures: Resolution of the Sumas Band, December 19, 1910, NA, RG 10, vol. 8094, file 987/32-30-5, pt. 1 (ICC Documents, pp. 103-04), and Sumas Band Surrender for Lease, February 20, 1911 (ICC Documents, pp. 134-38). The lease was assigned three times during the next decade: on December 20, 1912, from the Maclures to the Kilgard Fire Clay Co. Ltd (ICC Documents, pp. 156-60); on June 27, 1917, from Kilgard to Evans Coleman & Evans Limited (ICC Documents, pp. 245-49); and on June 11, 1918, from Evans Coleman to Clayburn Brick Company (ICC Documents, pp. 252-57). Ultimately, in the late 1970s and early 1980s the Band took back the land and now manufactures clay bricks through its own company, Sumas Clay Products.

[14] Andrew Haydon, McGiverin Haydon & Greig, Barristers and Solicitors, to J.D. McLean, Department of Indian Affairs, July 22, 1910, NA, RG 10, vol. 8094, file 987/32-30-6-5, pt. 1 (ICC Documents, p. 59).

[15] Memorandum from Superintendent General of Indian Affairs to Governor General in Council, July 26, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 65).

railway, road or public work without the consent of the Governor in Council . . ."[16] Order in Council PC 1585, dated August 1, 1910, approved the recommendation that "under the said section 46 of the Indian Act," VV & E "be allowed to acquire from the Department of Indian Affairs the Indians' interest in the right of way above referred to, upon such terms as may be agreed upon."[17]

On July 25, 1910, Indian Agent McDonald was instructed to determine the value of lands and Indian improvements affected by the right of way.[18] In order that "fair and satisfactory valuations" could be obtained as quickly as possible, a company representative was to be invited to accompany the agent during this process. The Assistant Deputy Superintendent General of Indian Affairs stressed: "It is understood that in all cases of rights of way the Indians interested are to be consulted with the view of obtaining their concurrence in such reasonable valuations as you may arrive at."[19]

Agent McDonald notified the Sumas Band that he intended to be at the reserve on August 8 to value the land and improvements. He asked Chief Ned "to have all the men belonging to Upper and Lower Sumas, on hand on that day, say about 9 o'clock in the forenoon, as I want to get through the business as soon as possible and return the same day. Mr. Simons, the Right of Way Agent of the Company, will go

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16 *Indian Act*, RSC 1906, c. 81.

17 NA, RG 2, 1, vol. 998 (ICC Documents, p. 67).

18 J.D. McLean, Department of Indian Affairs, to Indian Agent McDonald, July 25, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 64).

19 Ibid.

up with me."[20] On August 8, 1910, the Sumas Band passed a resolution stating that

> we the undersigned being a majority of the male members of the Sumas band of Indians of the full age of twenty one years, do hereby consent to the Department of Indian Affairs selling to the Vancouver, Victoria and Eastern Railway and Navigation Co. 41.95 acres for right of way through the Sumas Indian Reserve No. 6, as shown on blueprint copy of a plan sent from the Department, on the following conditions, viz:-
>
> 1) The said company to pay to the Department for the land (41.95 acres) the sum of $5,663.25 which amount we wish placed to the credit of our interest account so that it may be available when we need to purchase farming implements or other articles . . .[21]

The total valuation amounted to $12,668.25:

41.95 acres @ $135.00 / acre	5663.25
Clearing 28.6 acres @ $200.00 / acre	5720.00
Building, fruit trees, etc.	1285.00
	$12668.25 [22]

The company, however, objected to the valuations, charging that they were "largely in excess of those made by any of the other property owners for right of way over similar lands."[23] The Indian Agent defended his figures:

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[20] Agent McDonald to Chief Ned, August 2, 1910 (ICC Documents, p. 68).

[21] Sumas Band Resolution, August 8, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 69-71).

[22] Andrew Haydon to Secretary, Department of Indian Affairs, August 22, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 76-77).

[23] J.L. Snapp, Right of Way Agent, Great Northern Railway Company, to Agent McDonald, August 15, 1910 (ICC Documents, p. 72).

> The large area which the Company proposes to take from the best part of the reserve, and on which the Indians have so much improvements, together with the bad severance, is a most serious question for the Indians interests, and I consider the Company should be compelled to pay the compensation mentioned in the Resolution passed by the Indians otherwise it will not be satisfactory to them.[24]

To prepare for possible arbitration in this matter, Department of Indian Affairs staff in Ottawa asked the Inspector of Indian Agencies, W.E. Ditchburn, to review the valuations. He was "to make no change in Mr. McDonald's valuations of Indian improvements unless in any case of a valuation being excessive in your opinion, any reduction should be made in the value of the land only. In all valuations of this nature it is desired that the Indians should be consulted and you should endeavour to obtain their consent to such final valuations as you may arrive at. . . ."[25]

When the company's agent, Mr. Simons, met with Inspector Ditchburn on September 22, he brought with him a revised plan of right of way. Along almost the entire length of the right of way, the width had been reduced – from 400 feet to 250 feet in one section and from 200 feet to 150 feet in another – so that the acreage required was reduced from 41.95 acres to 28.83 acres. On account of these changes, Inspector Ditchburn had all the individual holdings of the Indians remeasured. He agreed with Agent McDonald that the land was worth $135.00 per acre, but he thought that the amount set for cleared land was excessive:

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[24] Agent McDonald to Secretary, Department of Indian Affairs, August 17, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 73-75).

[25] J.D. McLean, Department of Indian Affairs, to W.E. Ditchburn, Inspector of Indian Agencies, August 26, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 78-80).

> This portion of the reserve cannot be considered as cleared land; in fact it is only half cleared, and I have changed the valuation in this respect from $200.00 to $150.00 per acre for the amount of clearing that has been done and the damage by severance to the property.[26]

The new price for the land was $3892.05 (28.83 acres at $135.00 per acre), plus $4302.05 for individual clearings and improvements. There is no Band Council Resolution on file consenting to the amended area or valuations, but Inspector Ditchburn reported that "the Indians have all agreed to the above amounts. . . ."[27]

The company remitted $8194.55 on January 5, 1911. The Sumas Band's capital account was credited with $3892.05, and, on January 23, eight Indians were sent cheques for their improvements. By telegram dated January 14, 1911, VV & E was permitted to enter onto the Sumas Reserve No. 6 to begin construction.[28]

The amended survey plan had been forwarded to Ottawa on October 29, 1910.[29] On February 11, 1911, letters patent were issued by Her Majesty the Queen to VV & E.[30]

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[26] W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, October 4, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 87-90).

[27] Ibid.

[28] Andrew Haydon to Deputy Superintendent General of Indian Affairs, January 5, 1911; deposit receipt for $8194.55, January 9, 1911; and telegram from J.D. McLean to Agent McDonald, January 14, 1911, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 108, 109, 111).

[29] Andrew Haydon to Secretary, Department of Indian Affairs, October 29, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 97).

[30] Letters Patent, February 11, 1911 (ICC Documents, pp. 128-33).

Disposition of the Abandoned Right of Way

In 1927 VV & E ceased to use the right of way for railway purposes and removed the tracks on Sumas Reserve No. 6. On July 20, 1927, VV & E applied to the Provincial Secretary for the Province of British Columbia for the registration of its crown grant to the 28.83-acre right of way.[31] On August 29, 1927, the crown grant was registered, and a certificate of title was granted to VV & E on September 26, 1927.[32]

On December 20, 1927, Chief Ned of the Sumas Band wrote to Indian Agent Daunt regarding the railway land: ". . . I just found out this land is on sale. We don't want any white man to live between our Reserve because it will be quite useless for us to pass over this property. Because this land is right between our Reserve, they should give us the first chance to buy this land. . . ."[33] In forwarding Chief Ned's letter to Ottawa, Agent Daunt reported:

> The Railway Company have discontinued their line and taken up the tracks, prior to selling the right of way. The Indians wish to buy this back from their Funds. Some of the land concerned has already been sold, and was bought by Mr. Samuel MacLure. This man is willing to sell approximately 2,500 feet of right of way, 150 feet wide and amounting to about nine acres, which is the piece the Indians

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31 A.H. MacNeill, Barrister and Solicitor, to Provincial Secretary, British Columbia, July 20, 1927 (ICC Documents, p. 264); Memorandum from Superintendent of Lands, British Columbia, August 1, 1927 (ICC Documents, p. 266).

32 Provincial Order in Council, August 29, 1927, registering the Crown grant (ICC Documents, pp. 267-68); Certificate of Title No. 73953E, September 26, 1927 (ICC Documents, pp. 211-12).

33 Chief Ned, Sumas Band, to Agent O'N. Daunt, December 20, 1927, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 273-74).

apparently desire, at forty dollars an acre.

> I would recommend that under the circumstances their request be acceded to if Funds are available, as the land in question, lies between the rest of the Reserve and the clay deposits. It can be seen, therefore, that the Transportation Company having given up the ground, complications might arise if a white man entered into occupation of the strip in question.[34]

The railway company had already contracted, on September 23, 1927, to sell 12.08 acres of the 28.83-acre right of way to Samuel Maclure for $300.00. A certificate of title was issued to Maclure on February 28, 1928, and the land was subdivided into three lots on March 1, 1928.[35]

On March 31, 1928, A.F. MacKenzie, on behalf of the Assistant Deputy and Secretary of the Department of Indian Affairs, wrote to VV & E's lawyers:

> We are now informed that the railway company has discontinued its line and taken up the tracks prior to selling the right of way. As the right of way cuts through the Indian reserve, it is desired that it should be re-incorporated as part of the Indian reserve. . . . Please state what part of the right of way remains in possession of your Company and at what price you are willing to sell to this Department. I should also like to have a list of the areas you have sold, with the names and addresses

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[34] Agent O'N. Daunt to Assistant Deputy and Secretary, Department of Indian Affairs, December 21, 1927, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 275).

[35] Indenture between VV & E and Samuel Maclure, September 23, 1927 (ICC Documents, pp. 269-70); Certificate of Title No. 76565E, February 25, 1928 (ICC Documents, p. 279); Certificate of Title No. 76622E, March 1, 1928 (ICC Documents, pp. 280-81).

of the purchasers and a plan showing the parcels as sold.[36]

In reply, VV & E stated that 12.08 acres had been sold to Sam Maclure and the balance was to be turned over to the Clayburn Brick Company (which operated on the reserve as assignee of the Maclures' 1910 lease) as soon as the agreement between the two companies had been executed. A certificate of title for 28.83 acres less 12.08 acres was issued to the Clayburn Company Limited on October 30, 1928.[37]

In the interim, on January 23, 1928, the Sumas Band had passed a resolution petitioning the Department of Indian Affairs to purchase "approximately 2500 feet of abandoned right of way" (approximately 9 acres) from Samuel Maclure for $40.00 per acre. Indian Agent Daunt did not forward this application for purchase to Ottawa until March 16, 1928.[38]

On June 22, 1928, the Department of Indian Affairs in Ottawa asked Indian Agent Daunt why only part of Maclure's 12.08 acres was included in the proposed purchase by the Sumas Band.[39] On June 29, 1928, Agent Daunt replied:

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[36] A.F. MacKenzie, Department of Indian Affairs, to McGiverin, Haydon & Emms, March 31, 1928 (ICC Documents, p. 284).

[37] A.H. MacNeill, Barrister, to McGiverin Haydon & Ebbs, June 14, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 290); Certificate of Title No. 80481E, October 30, 1928 (ICC Documents, pp. 305-06).

[38] Resolution of Sumas Band, January 23, 1928 (ICC Documents, p. 277), and letter from Agent O'N. Daunt to Assistant Deputy and Secretary, Department of Indian Affairs, March 16, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 282).

[39] A.F. MacKenzie, Department of Indian Affairs, to Agent O'N. Daunt, June 22, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 292).

> I beg to inform you that the outstanding portion of 3.50 acres, not included in the proposed purchase, is not desired by the Indians, and I do not consider that it would be of any use to them. As a matter of fact were it not for the fact that private ownership of the 8.58 acre parcel would cut the Reserve in two, and interfere with communications, I would not have recommended the repurchase of any of the land.
>
> This piece, however, while of no particular value in itself, allows the Reserve to remain in one piece, but no useful purpose would be served by repurchasing the odd 3.50 acres, and I do not recommend that it be entertained.
>
> I understand some parties have acquired it as a speculation, and I have no doubt that we shall be pressed to consider it in the near future.[40]

On July 30, 1928, a certificate of title for Lot 1 of the 12.08-acre portion of the abandoned right of way on the Sumas Reserve was issued to the Department of Indian Affairs. The Band paid $343.00 for this land. It was not until August 18, 1965, that Order in Council PC 1965-1501 confirmed this land as part of IR No. 6. Lot 2 (0.3 acres) was retained by Mr. Maclure.[41] Lot 3 (3.20 acres) was sold to Allan C. Keeping.[42]

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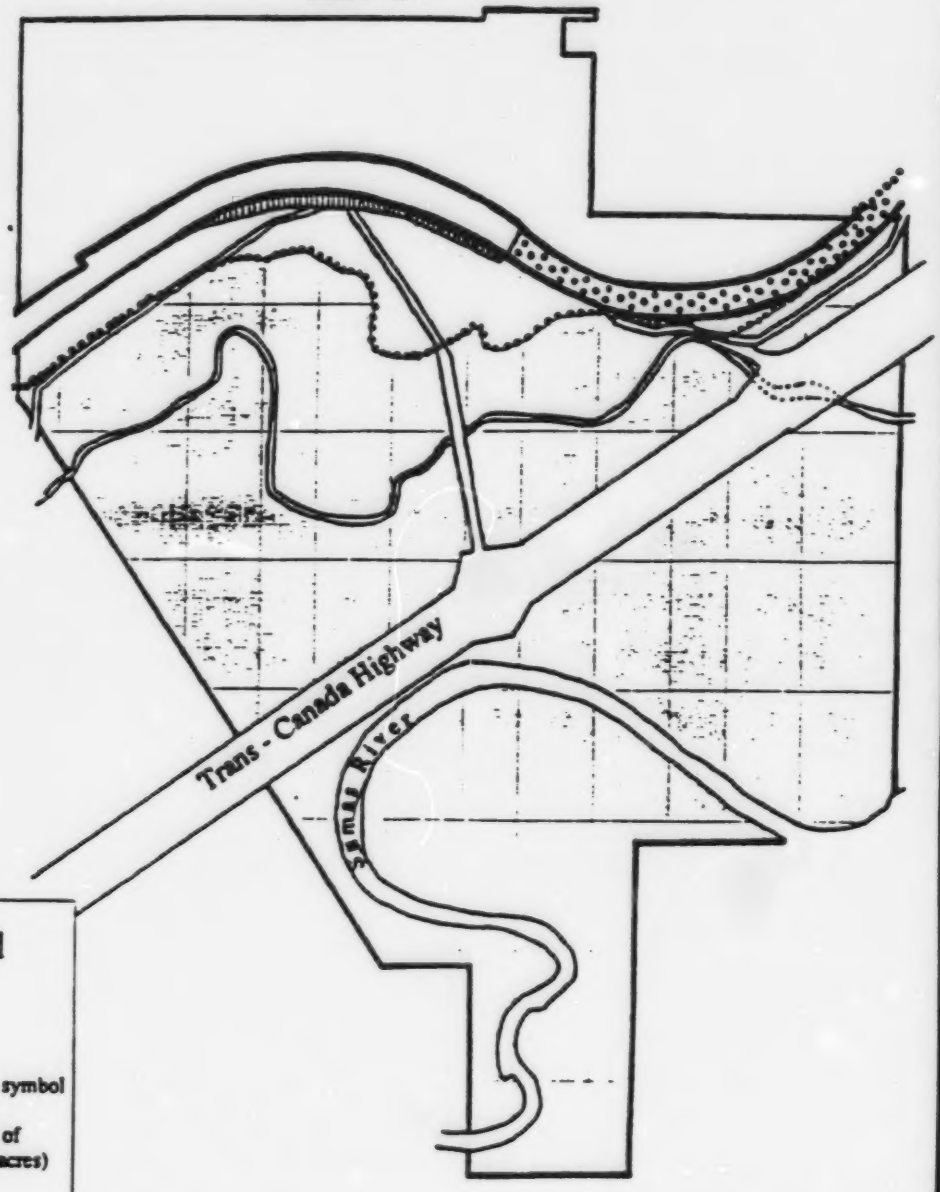
[40] Agent O'N. Daunt to Assistant Deputy, Department of Indian Affairs, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 293).

[41] Certificate of Title No. 78827E, July 30, 1928 (ICC Documents, p. 294); Trust Account Voucher, August 18, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 298); Order in Council PC 1965-1501, August 18, 1965, DIAND, Land Registry # X012972 (ICC Documents, pp. 371-73).

[42] Certificate of Title No. 79682E, September 26, 1928 (ICC Documents, p. 304).

MAP 2
Sumas Indian Reserve No. 6



Legend

- Flood plain symbol
- 1910 Right of way(28.83 acres)
- 1913 Additional right of way (1.26 acres)
- Repurchased by the Band (8.58 acres)

EFFECT OF THE RIGHT OF WAY

The evidence indicates that the injurious effect of the right of way was apparent to the Department of Indian Affairs. Indian Agent McDonald had noted at the valuation stage that the right of way was to be taken "from the best part of the reserve."[43] Most of the Band's improvements, its houses and buildings, were on this portion of land. So too was a burial ground; elder Hugh Kelly told the Commission that the right of way went through the middle of the cemetery, and that his father helped remove the bones.[44]

Furthermore, there was very little good land on the reserve to begin with. As indicated on Map 2, Sumas IR No. 6 is mostly flood plain, and the right of way cut through the small segment of the reserve that lies above the flood plain. Thus, the true effect of the appropriation was not simply that it deprived the Sumas Band of some of its best land; it deprived the Band of a substantial tract of the only good land it had. The "bad severance" of which Agent McDonald spoke is also evident from the map. The right of way severed the core of the reserve into two.

This situation continues to be problematic. The map shows that approximately two-thirds of the right of way has remained out of the hands of the Sumas Band. Chief Lester Ned explained to the Commission the effect this has had:

> It directly affects my people here because it cuts our reserve in half, the residential part of it, and so any developments we try to do, it's next to impossible because they're right in the heart of Sumas Indian reserve.[45]

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[43] Note 24 above.

[44] ICC Transcript, pp. 38-39.

[45] ICC Transcript, p. 43.

The alienated land lies above the flood plain, and thus is land that could have been used for residential development. The capacity for such development on the Sumas reserve is restricted. In explaining the problems of limited residential land and an expanding population on the reserve, Chief Ned remarked: "we'll have to start building highrises if we want more houses here."[46]

Agent Daunt's observation in 1928 that "complications might arise if a white man entered into occupation of the strip in question" has also proved true. On part of the alienated portion of the right of way, there are houses belonging to non-Indians. On another part there is the Flexlox plastic pipe manufacturing plant. This is a noxious use, situated in the midst of residential land, over which the Band has no control. The Commission heard complaints of traffic, fumes, and hazardous materials being transported through the reserve and dumped on the Flexlox site.[47]

1.26-Acre Additional Right of Way

In 1913 VV & E acquired an additional 1.26 acres of Sumas IR No. 6, for railway purposes pursuant to the *Indian Act* and *Railway Act*. The 1.26-acre addition to the VV & E right of way was part of the claim submitted by the Sumas Band to the Department of Indian Affairs in 1984. After reviewing the facts of this particular claim, the Office of Native Claims informed the Band's lawyers as follows:

> . . . apart from that portion of land transferred to the municipality for road purposes, the Indian interest in the 1.26 acre parcel was not legally taken, and the land continues to be legally part of the

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[46] ICC Transcript, p. 74.

[47] See testimony of Chief Lester Ned and Ray Silver (ICC Transcript, pp. 47-53).

> reserve. . . .
>
> We have therefore been advised that, at least with respect to the land not transferred to the municipality, the Indian interest was not lawfully taken and, although the railway company (or its successors) may have some interest in the land or at least a claim against the Crown, the land is still legally part of the reserve.
>
> The Office of Native Claims is prepared to recommend to the Minister that this claim be accepted on the basis outlined above. . . .[48]

The Sumas Band came to the Indian Claims Commission in September 1993, and in January 1994 its counsel requested that the 1.26-acre claim be considered by the Commissioners with the rest of the package.[49] At an ICC Planning Conference held in Vancouver on March 18, 1994, both Canada and the Sumas Band agreed that "there was some misunderstanding between the parties relating to the grounds on which the 1.26 acre claim had been accepted for negotiation. To clarify this, the parties agreed to discuss, on March 25, 1994, the grounds on which the 1.26 acres had been or could be accepted for negotiation."[50] On April 28, 1994, Specific Claims West wrote to Chief Lester Ned with a cash settlement offer, which the Band could accept without prejudice to its claim to the 28.83-acre property.[51] The 1.26 acres, then, is no longer a consideration in this Inquiry.

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48 Manfred Klein to Leslie Pinder, note 5 above.

49 Clarine Ostrove to Indian Claims Commission, January 12, 1994, ICC file 2109-13-1.

50 Summary of ICC Planning Conference, March 18, 1994, ICC file 2109-13-1.

51 Peter Vranjokovic, Specific Claims West, DIAND, to Chief Lester Ned, Sumas Band, April 28, 1994, ICC file 2109-13-1.

PART III

ISSUES

This Commission has the mandate to inquire into and report on whether a claimant Indian Band has a valid claim for negotiation under the government of Canada's Specific Claims Policy. As noted earlier, the Policy states that the government will recognize claims which disclose an outstanding lawful obligation on the part of the federal government. A lawful obligation is defined as "an obligation derived from the law"; it may arise, for example, as a result of an illegal disposition of Indian land, non-fulfilment of a treaty, or other breach of obligation.[52]

Thus, the question before the Commission is whether Canada has an outstanding lawful obligation toward the Sumas Band, with respect to the appropriation of 28.83 acres for a railway right of way across Sumas IR No. 6. There are a number of specific legal issues concerning the effect of the taking and the subsequent disposition of the right-of-way lands. These issues have been framed as follows:

1 What interest in IR No. 6 was taken by VV & E, and what interest, if any, remained in the Band or Canada?

2 What obligation, if any, did Canada have when it learned that VV & E no longer needed the right of way for railway purposes?

3 If VV & E did acquire absolute title to the right of way, did Canada breach its fiduciary obligation to the Sumas Band by

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52 *Outstanding Business*, note 3 above, 20.

executing the Order in Council or issuing letters patent to the railway company?

4 In the alternative, was the Order in Council valid only for the taking of the 41.95-acre parcel as set out in the original plan of right of way, and did Canada therefore breach section 46 of the *Indian Act* by failing to obtain the consent of the Governor in Council for the taking of 28.83 acres of IR No. 6?

PART IV

ANALYSIS

BACKGROUND

The Statutory Scheme

The relevant sections of the *Railway Act* and the *Indian Act* are set out below.

Railway Act, RSC 1906, c. 37.

> **172.** No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.
>
> 2. Any company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.
>
> 3. The company may not alienate any such lands so taken, used or occupied.
>
> 4. Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose of trust.
>
> . . .
>
> **175.** No company shall take possession of or occupy any portion of any Indian reserve or lands, without the consent of the Governor in Council.

2. When, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner.

Indian Act, RSC 1906, c. 81.

46. No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council, and, if any railway, road, or public work passes through or causes injury to any reserve, or, if any act occasioning damage to any reserve is done under the authority of an Act of Parliament or of the legislature of any province, compensation shall be made therefor to the Indians of the band in the same manner as is provided with respect to the lands or rights of other persons.

2. The Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation.

3. The amount awarded in any case shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements taken or injured.

The Order in Council and Letters Patent

Section 175 of the *Railway Act* and section 46 of the *Indian Act* require that the Governor in Council consent to the taking of reserve lands. The consent to the taking of the right of way across the Sumas reserve is found in Order in Council PC 1585, dated August 1, 1910:

> . . . The Minister observes that the Chief Engineer of the Department of Railways has certified on the plans of right of way that the lands applied for are actually required for railway purposes and are such as the company should be allowed to acquire under section 46 of the Indian Act.
>
> . . . The Minister, therefore, recommends that under the said section 46 of the *Indian Act* the Vancouver, Victoria & Eastern Railway & Navigation Company be allowed to acquire from the Department of Indian Affairs the Indians' interest in the right of way above referred to, upon such terms as may be agreed upon. The Committee submit the same for your approval.

Note that the right of way to which reference is made is that set out in the original plan, comprising 41.95 acres.

The letters patent, issued to VV & E on February 11, 1911, include the following terms:

> . . . whereas We have thought fit to authorize the sale and disposal of the lands hereinafter mentioned, in order that the proceeds may be applied to the benefit, support and advantage of the said Indians, in such manner as we shall be pleased to direct from time to time.
>
> And whereas The Vancouver Victoria and Eastern Railway and Navigation Company have contracted and agreed to and with Our Superintendent General of Indian Affairs, duly authorized by Us in this behalf, for the absolute purchase at and for the price and sum of eight thousand and one hundred and ninety four dollars and fifty five cents.
>
> . . . We, by these Presents, do grant, sell, alien, convey and assure unto the said The Vancouver Victoria and Eastern Railway and Navigation Company, their successors and assigns forever; all that Parcel or Tract of land situate, lying and being in the Sumas Indian Reserve number 6 . . . comprising all the right, title, estate, interest and demand whatsoever of the said Indians of, in or to or out of the Right of way of the Vancouver Victoria and Eastern Railway through said Reserve.

Containing twenty eight acres and eighty three hundredths of an acres more or less.

SUMMARY OF ARGUMENTS

The Band's Argument

The Band argues that VV & E acquired only an easement, and not ownership in fee simple of the right of way across IR No. 6. The only way that the Band's interest in the reserve land could be alienated absolutely, it maintains, is by way of surrender to the Crown. Furthermore, the legislative scheme taken as a whole (in particular, the protections for reserve land in the *Indian Act* and the public-purpose limitation in the *Railway Act*) reveals Parliament's intention that any appropriation for railway purposes should infringe the rights of the Band as little as possible.

The Band further maintains that, even if VV & E took more than an easement, the most the company could have acquired was a right to use the land for railway purposes with a reversionary interest to the Band. Section 172 of the *Railway Act* permits a railway company to "take and appropriate" lands provided that the lands are required for the use of the railway and its works; in addition, the section expressly prohibits alienation of appropriated lands. Therefore, when no longer used for railway purposes, the right of way should have reverted to the Crown for the sole use and benefit of the Band. If the appropriation did result in VV & E obtaining the absolute fee simple in the right of way, the Band submits that the Crown breached its fiduciary duty in giving up more of an interest in the reserve than was necessary for the purpose of running a railway.

As an alternative argument, the Band submits that the Governor in Council's consent to the appropriation, which was based on the original plan of right of way

showing 41.95 acres, did not apply to the 28.83-acre parcel actually taken. Since the statutory requirement of Governor in Council consent was not met, the appropriation was invalid and VV & E acquired no legal interest in the right of way.

Canada's Argument

Canada argues that VV & E acquired a fee simple interest in the right-of-way lands, and that the appropriation terminated the Band's interest in the right of way. The words "take and appropriate" in section 172 of the *Railway Act,* counsel for Canada maintain, indicate that the railway company was empowered to acquire a fee simple interest. Canada provides various definitions and judicial interpretations of "appropriate" which suggest that appropriation confers absolute dominion. Canada also argues that the Order in Council and letters patent are evidence of the Governor in Council's intention to convey a fee simple interest to VV & E. The Order in Council and letters patent do not place any conditions on the transfer.

Since the Band had no ongoing reserve interest in the right of way, Canada maintains that there was no obligation to restore the right of way to the Band when it ceased to be used by the railway. Any fiduciary obligation owed to the Sumas Band was satisfied when the Band received adequate compensation. Furthermore, Canada had no discretion to ensure a form of conveyance to VV & E that would have created a reversionary interest in the Band, because the *Railway Act* became operative once consent was given and the right of way was taken in accordance with the provisions of that Act. Canada therefore had no fiduciary duty in this regard. Finally, Canada argues that the Governor in Council's consent to the taking of the 41.95-acre right of way applied to the taking of the included 28.83-acre portion.

ISSUE 1: WHAT INTEREST WAS TAKEN?

1 What interest in IR No. 6 was taken by VV & E, and what interest, if any, remained in the Band or Canada?

The general approach to determining what interest was taken is set out in *Canadian Pacific Limited v. Paul*.[53] In *Paul*, the Supreme Court of Canada was faced with conflicting claims to the use of a railway right of way across a reserve. In resolving this conflict, it was necessary to establish the nature of a railway company's interest in the right of way. The Court's approach to the question was to "look to the language of the statutes, to any agreements between the original parties and to subsequent actions and declarations of the parties."[54] The key factor in determining the railway's interest was the interpretation of the legislation under which it acquired the right of way.[55]

In undertaking this exercise, we are guided by *A.G. Canada v. Canadian Pacific Limited and Marathon Realty Company Limited*,[56] which provides an interpretation of the applicable statutes. The *Marathon Realty* case also concerned a railway right of way across a reserve. The right of way was appropriated in 1927 by Canadian Pacific Railway Company (CP), pursuant to the *Indian Act* and *Railway Act*. The Governor in Council consented to the appropriation, and the Order in

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53 [1988] 2 SCR 654, [1989] 1 CNLR 47.

54 Ibid., at 53 (cited to CNLR).

55 Ibid., at 57.

56 [1986] 1 CNLR 1 (BCSC), aff'd BCCA, May 14, 1986 (unreported), hereinafter "*Marathon Realty*."

Council attached no conditions to the sale. CP subsequently conveyed the land to Marathon Realty.

Canada sought return of the right-of-way lands to the Crown, since the lands were no longer used for railway purposes. Mr. Justice Meredith held that section 189(3) of the *Railway Act* (identical to section 172(3) of the 1906 Act) prohibited a railway company from alienating any lands taken under that section. The plain wording of the section dictated this result: "The company may not alienate any such land so taken, used or occupied."[57] Thus, the purported alienation to Marathon Realty was illegal. Furthermore, both the *Railway Act* and section 48(1) of the 1927 *Indian Act* (substantially the same as section 46 above) allowed the appropriation of reserve land only if it was necessary for railway purposes.[58] This statutory requirement was echoed in the Order in Council, which predicated consent to the taking on certification that "the Canadian Pacific Railway Company requires the land herein described for a railway right of way . . . ." By necessary implication,

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[57] This inalienability proviso applies only to Crown land. In general, the railway company was empowered to take land and to alienate it when it is no longer needed, pursuant to section 151 of the *Railway Act*, RSC 1906, c. 37:

> **151.** The company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained, . . .
>
> (c) purchase, take and hold of and from any person, any lands or other property necessary for the construction, maintenance and operation of the railway, and also alienate, sell or dispose of, any lands or property of the company which for any reason have become not necessary for the purposes of the railway; . . .

[58] Under section 189(2) of the *Railway Act* (equivalent to section 172(2)), a company could take and appropriate "for the use of its railway and works" as much Crown land "as is necessary for such railway." Similarly, the *Indian Act* contemplated expropriation "for the purposes of any railway."

land no longer used for railway purposes "must be restored to the Crown."

Marathon Realty therefore disposes of the argument that VV & E acquired the full fee simple; we know that, upon abandonment of the railway, appropriated land is properly restored to the Crown. Mr. Becker, counsel for Canada, stated in oral argument that he was not trying to distinguish *Marathon Realty*, and thus he acknowledged that upon discontinuance of the railway line the land "went back to the Crown."[59] We also note that the authorities cited in Canada's written submission for the proposition that a railway company acquires a fee simple absolute on expropriation all contain the qualifier that the "absolute" fee simple is only in the company as long as the lands are used for railway purposes.[60]

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[59] ICC Transcript, pp. 203-04.

[60] Two specific examples illustrate this point. In support of his argument, Mr. Becker cites *Metropolitan Realty Company v. Fowler*, [1893] AC 416. Although the Court of Appeal decided that the railway company had exclusive title to the land surrounding a tunnel, Lord Watson also remarked as follows: "It may be that if their railway undertaking was wholly abandoned their statutory title to the subsoil of the highways would cease, and the land which they possess by virtue of it would revert to the original owner." Lord Watson further noted that the company has all the right to the land in perpetuity, which is what defines a fee simple, *if* they choose to avail themselves of it – i.e., if the land is used for railway purposes. Until abandonment actually takes place, the railway has what is practically identical to a fee simple absolute.

In *Norton v. London and Northwestern Railway Co.* (1878), 9 Ch.D. 623, Vice Chancellor Mallins considered what rights railway companies acquire in land which they take for the purposes of constructing a railway. At 627, he stated the following:

> That they acquire the absolute fee simple of the land is not in dispute. I am clearly of the opinion that every railway company taking land for the purpose of constructing, maintaining, and using their railway, have the fee simple of all the land which they are authorized to take, and they have a right to exclude all other persons entering upon that land without permission; but they have it in a qualified manner in which land taken for particular purposes is taken.

He continued as follows at 632:

While the case law establishes that the Crown has, in effect, a reversionary interest, it does not establish that the land reverts to the Crown "*for the sole use and benefit of the Band*," as the Band asserts.[61] In other words, the question that *Marathon Realty* leaves open is whether the Band's interest must also be restored. Canada says that there can be no reversionary interest in the Band because the statutes, Order in Council and letters patent, and subsequent conduct of the parties show that the Band was fully divested of its interest.

It is clear from *Marathon Realty* that the reversionary interest in the Crown exists because of the railway-purposes limitation and the inalienability proviso in section 172 of the *Railway Act*. It is unclear why the statute would not have the same effect on the Indian interest in reserve lands. If anything, the case for a reversionary interest in the Band is stronger: we are dealing not with unoccupied Crown lands, but with lands set aside for Indians. Furthermore, there is nothing in sections 172 or 175 of the *Railway Act* to suggest that the Indian interest in reserve lands may be taken absolutely, while the Crown's ultimate title is preserved. The railway-purposes limitation and inalienability proviso apply generally. Since the legal nature of reserve lands is that the Crown holds the underlying title for the use and benefit of the

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> . . . though they have an absolute and unqualified fee simple, they can only use the land for the purpose for which they acquired the land . . . . Their property and their purposes are altogether of a limited character.

With respect, the Vice Chancellor used the term absolute rather loosely; it is not clear how the company can have an absolute fee simple and a "property . . . of a limited character." He appears to have meant that the fee simple is subject to the condition that the land is used for railway purposes. At the time, however, this distinction was practically irrelevant because it was assumed that the railways would be operating in perpetuity.

[61] Note that, in *Marathon Realty*, Canada sought an order returning a right of way to the Crown. The Penticton Band was not a party.

Indians, it stands to reason that the land should revert to the Crown on this basis. with the beneficial interest intact.

Canada argues that this, however, is not the end of the matter; to be consistent with *Paul*, we must look not only to the statutes, but to any other relevant documents or actions that speak to the intention of the parties. First, there is the Order in Council, which recommends that VV & E "be allowed to acquire from the Department of Indian Affairs the Indians' interest in the right of way . . . ." The letters patent are even stronger: they grant to VV & E an interest "comprising all the right, title, estate, interest and demand whatsoever of the said Indians" in the right-of-way lands. The letters patent *per se* operate as an outright grant of the land. Thus, the argument is that the Indian interest was taken absolutely, without condition, so that no reversionary interest was left. The Governor in Council granted to VV & E the entire Indian interest in the right of way.

We have some difficulty with this argument. The *Railway Act* permits the taking and appropriation of Crown land, including Indian reserve land, for railway purposes. The railway-purposes limitation is imposed by statute, but an absolute grant would allow the railway company to use the land for any purpose. An absolute grant also conflicts with the inalienability proviso in the Act. Canada's position seems to be that the Governor in Council could have conveyed any interest, regardless of the clearest statutory restrictions. It is an established principle of constitutional law, however, that executive action cannot be inconsistent with a statute.[62]

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[62] See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), 571, n.10.

One way of applying this principle is to treat the grant as incorporating the statutory limitations, as was done in *Marathon Realty*. In that case the defendants argued that, since no conditions were attached to the "sale" to CP, the company obtained absolute title to the expropriated reserve lands. Accordingly, as full owner, it was entitled to alienate the property. The Court rejected this argument; it was unnecessary for the Governor in Council to attach conditions to the sale, since the terms and conditions (of inalienability and restoration upon non-user) were already set out in the *Railway Act*. The grant was not illegal or void, but it was subject to conditions that would bring it into line with the governing statute. Applying this principle here, we conclude that the letters patent were not effective in transferring the entire Indian interest.

Similarly, the Order in Council does not advance Canada's argument, because it too must conform to the applicable statutes. At any rate, in this case the consent to the appropriation contained in the Order in Council was predicated on the chief engineer's certification that the lands "are actually required for railway purposes." There was, therefore, an underlying condition on the consent given by the Governor in Council, and the transfer of the subject lands to VV & E was subject to that condition.

Canada also relies on the Band's consent to the "sale" of the right of way (as stated in the Band Council Resolution), and Chief Ned's assumption that the Band would have to buy the land back after VV & E abandoned the railway line.[63] Thus, the Indians themselves understood that they no longer had any interest in the right of way. We are not persuaded by this line of argument. The term "sale" does not

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[63] Letter from Chief Ned, note 33 above.

necessarily imply a fee simple absolute; clearly, one can sell a fee simple subject to a condition that the lands be used for railway purposes. We also hesitate to rely on Chief Ned's assumption that the Sumas Band would have to repurchase the right of way, given that he did not have the benefit of legal counsel on what is obviously a complex legal question. Moreover, a Band Council Resolution and a letter from the Chief, whatever their contents, cannot supersede a statute.

Canada raised the further matter of compensation. The Band was compensated for the full value of the lands, which presumably means the value of the fee simple interest. Furthermore, section 175 of the *Railway Act* specifically provides for compensation if reserve lands are taken, but no compensation is mandatory for the taking of other lands vested in the Crown. This might suggest that the reversion should not attach to the Band, because the Band gave up its entire interest and was paid accordingly. We are of the view, however, that the fact of adequate compensation for the land taken does not preclude us from finding a reversionary interest in the Band. A fee simple determinable (that is, a fee simple that may end if a specified terminating event occurs) may in theory be valued as a fee simple, depending on the uncertainty of when and if the terminating event will occur. It is likely that in 1910 most thought the railway would continue operating in perpetuity. Under that assumption, a fee simple determinable is equivalent in value to a fee simple absolute.

Having considered all the arguments, we find that the most that VV & E could have taken was a fee simple determinable. This conclusion follows from the clear terms of the statute and the *Marathon Realty* case. We further find that the Band was left with some property interest in the right of way in the nature of a reversion. This kind of interest does not revert automatically from the third party to the Band upon

the terminating event.[64] Rather, the Crown assumes its traditional role as intermediary, and the land reverts to the Band *through* the Crown.[65]

The Band argues that the railway company acquired even less than a fee simple determinable, that it acquired an easement. This is the Band's primary argument, and it is advanced on a number of grounds. One ground, asserted in oral argument, is that the "take and appropriate" language in section 172(2) of the *Railway Act*, upon which Canada relies to show that VV & E acquired a fee simple, does not even apply to the taking of reserve lands for railway purposes. Instead, the operative language is "take possession of, use or occupy" found in section 175, which deals specifically with the taking of Indian lands. Section 175 therefore provides that a railway company is empowered to take only a right of possession or occupation – that is, an easement – from reserve lands.

In our view, however, section 175 may be read as adding to the general provision, section 172, by specifying that compensation is to be paid for the taking of reserve land. (There is no provision for compensation in section 172, except for Crown land held for a special purpose or subject to a trust.) The general provision

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[64] As would a possibility of reverter in real property law.

[65] This classification of the interest left in the Band follows from the *sui generis* nature of the Indian interest in reserve land. If what the Band had in the first place was a *sui generis* interest in the reserve, then properly speaking anything carved out of this interest that remained in the Band would also have to be a *sui generis* interest. This view is supported by the case of *St. Mary's Indian Band v. City of Cranbrook*, [1994] 3 CNLR 187 (BCSC). That case concerned the legal effect of a surrender qualified in the following way: ". . . And that should at any time the said lands cease to be used for public purposes they will revert to the St. Mary's Indian Band free of charge." The Court held that this qualification did not give rise to a reversion as it is known in English real property law. Instead, it gave rise to a *sui generis* reversionary interest, which in turn placed a fiduciary obligation on the Crown to restore the Band's interest if the land ceased to be used for public purposes.

still applies, however, because reserve lands are lands "vested in the Crown." Thus, section 175 is not an alternative section, but one that is to be applied in conjunction with section 172 as applying to a particular type of Crown lands. Furthermore, section 46 of the *Indian Act*, which also applies, provides that reserve land may be "taken." We are not convinced that there is any significant difference between "take" and "take and appropriate." We also appreciate that the Court in *Marathon Realty* applied section 172 to the taking of reserve land. This judicial authority conflicts with the Band's submission that section 175 alone governs the taking of reserve lands.

Another of the Band's arguments is that the Order in Council supports the easement model, in that it speaks to the acquisition of the Indians' interest in the *right of way*. In our view, this language is not conclusive, because "right of way" may refer to the strip of land in the plan of right of way – that is, to a physical space – rather than to the legal nature of the interest.

Counsel for the Band also urged us to consider the taking within the larger context of the *Indian Act* and, in particular, the surrender provisions. Under section 48 of the *Indian Act*, reserve lands are protected in that they cannot be alienated unless there is a surrender. Thus, they maintain, the only way that the Sumas Band's reserve interest in the right of way could have been given up is by way of a surrender. In our view, this argument must be rejected. A taking is a separate mechanism and is by definition a non-consensual process that favours public purposes over the protection of Indian lands.

This is not to say, however, that the protections for reserve lands contained in the *Indian Act* are irrelevant to this issue. Ms Pinder, counsel for the Band,

asserted in oral argument that section 46 of the *Indian Act* and section 172 of the *Railway Act* should be construed so as to release the smallest reserve interest possible. Given the special status and protection afforded reserve land under the *Indian Act*, and bearing in mind the principle that all statutes should be taken as a coherent whole,[66] she urged us to conclude that Parliament intended to confer on VV & E the power to take from reserves nothing more than the minimum required for railway purposes. A right to exclusive occupation to the strip of land required for railway purposes, that is, a statutory easement, was all that VV & E required.[67]

Although this argument has some merit, it fails to address the case law holding that, when a railway company expropriates, it acquires a fee simple as long as the land is used for railway purposes. The weight of judicial authority suggests that, generally speaking, the extent of rights required by a railway makes its interest in land appropriated more akin to a fee simple than to an easement. The railway has the right to possess and use the land exclusively, to alter it, remove earth and timber, and to manage it generally. At a certain point, the railway's interest may lose its resemblance to an easement.

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[66] See P.A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1992), 288.

[67] We note that, when the Band's counsel argue that all VV & E got was an easement, they must mean a statutory easement, rather than an easement as the term is generally used in real property law. The term "statutory easement" is used to describe a right that originates in a statute and resembles an easement. A right of way for the operation of a railway resembles an easement but is not actually an easement, because "no right will be recognized as an easement which is in effect a claim to exclusive or joint user of the servient tenement": E.H. Burn, *Cheshire & Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988), 499-500. By laying down tracks and running the railway, VV & E claimed possession of the land, to the exclusion of the Sumas Band; this kind of right does not fall within the definition of an easement at common law.

It is true that the Supreme Court of Canada held in *Paul* that CP acquired a statutory easement in the nature of a right of way. One can draw a distinction, however, between the facts of that case and the facts here: the terms of CP's incorporating statute clearly differentiated between the "owner" of the land and the railway company. The statute provided that the railway company could remove and use any earth, gravel, stone, or timber "without any previous agreement with the owner or owners. . . ." As the Court noted, such a provision would be meaningless if the company had obtained a fee simple. In addition, the Crown subsequently granted to another company the fee simple in other rights of way across the reserve that were created under the same statute; accordingly, the fee simple could not have been granted in the first place. There are no similar factors militating against a grant of a qualified fee simple here.

We find, therefore, that VV & E acquired more than an easement, that it acquired a fee simple in the right of way across the Sumas reserve as long as it was used for railway purposes. We further find that the taking did not extinguish the Band's interest in the right-of-way lands. Both the Band and Canada had the right to have their interest in the right of way restored on termination of the railway's interest.

ISSUE 2: THE CROWN'S OBLIGATION UPON ABANDONMENT OF THE RAIL LINE

2 What obligation, if any, did Canada have when it learned that VV & E no longer needed the right of way for railway purposes?

The Band argues that the Crown had a fiduciary duty to protect the Indians' beneficial interest in the right of way and to enforce the condition of non-alienability by VV & E. Presumably this means that, upon VV &E's abandonment of the line, the Crown was under an obligation to have the right of way restored for the use and benefit of the Band.

Canada starts with the proposition that the effect of the appropriation was to divest the Indians of their interest in the subject lands. Canada maintains that there is no legislation, agreement, or undertaking obliging Canada to return the lands to reserve status once they were abandoned by the railway company. In fact, the Band consented to the taking, was compensated for the value of the land and improvements, and never expected the right of way to be returned automatically.

Furthermore, Canada submits that it had no fiduciary duty to restore the right of way to the Band. In oral argument, Mr. Becker stated that the legal criteria for a fiduciary obligation did not arise in this case, because there is no "corpus" or subject matter of the obligation.[68] Canada, having statutorily imposed itself as an intermediary, is obliged to act as a fiduciary with respect to reserve lands. But if the Band has no reserve interest left, if the reserve interest to which a fiduciary duty will attach is extinguished, there is no basis for a fiduciary obligation. A fiduciary duty would have to be predicated on an ongoing Indian interest in the land.

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[68] ICC Transcript, p. 175.

Given our finding that the Band had a reversionary interest in the right of way, it follows from Mr. Becker's own argument that Canada had a fiduciary obligation to restore the use and benefit of the land to the Band. In our view, there was an ongoing Indian interest in the land, and Canada, in its role as intermediary with respect to reserve lands, had an obligation to act on behalf of the Band to restore its interest.[69] Therefore, we find that Canada breached its fiduciary obligation to restore the right of way to the Band. Furthermore, even if we were to accept that the entire Indian interest in the right of way was taken, we would nevertheless find that the Crown had a fiduciary obligation to restore the right of way to the Band.

Kruger v. R.[70] established that the Crown has a fiduciary duty in the context of an expropriation of reserve land. In *Kruger*, the Crown expropriated portions of a reserve for airport purposes. The Federal Court of Appeal held that the principles articulated in *Guerin v. R.*[71] in the context of a surrender of reserve lands also apply to an expropriation of reserve lands. Mr. Justice Urie (Stone J. concurring) stated that the precise obligation on the Crown was to ensure that "the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians. . . ."[72] Mr. Justice Heald, concurring in the result, explained the nature of the duty as follows:

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[69] In addition, the *St. Mary's Indian Band* case, note 62 above, supports the conclusion that where a Band has some sort of reversionary interest in a reserve, the interest gives rise to a fiduciary duty on the Crown to ensure that the property is restored to the Band.

[70] [1985] 3 CNLR 15 (Fed. CA), 17 DLR (4th) 591.

[71] [1984] 2 SCR 335, [1985] 1 CNLR 120.

[72] Note 70 above, at 41.

> . . . I think it clear that the fiduciary obligation and duty being discussed in *Guerin* would also apply to a case such as this as well and that on the facts in this case, such a fiduciary obligation and duty was a continuing one – that is, it arose as a consequence of the proposal to take Indian lands and continued throughout the negotiations leading to the expropriations and thereafter including the dealings between the Crown and the Indians with respect to the payment of the compensation to the Indians . . .[73]

Mr. Becker notes in his written submission that the adequacy of compensation has not been raised as an issue in this Inquiry. The suggestion seems to be that, in an expropriation, the fiduciary duty on the Crown continues up to the point of compensation; if adequate compensation is secured, any fiduciary obligation on the Crown is fulfilled.

Ms Ostrove, for the Band, pointed out in oral argument that *Kruger* involved an expropriation, but not a subsequent abandonment of the use for which the land was taken. The Court was not asked to consider what obligation might arise if the land ceased to be used for public purposes, upon which event there is a right in the Crown to have title restored. Thus, it does not follow from *Kruger* that we need look no further than the fact of adequate compensation, because the case of the Sumas Band is different.

We agree with counsel for the Band that the issue of fiduciary duty is not closed at the point of compensation. It is clear from *Kruger* that, when reserve land is taken, a fiduciary duty takes hold to regulate the Crown's exercise of discretion. If there is a reversionary interest in the Crown, however, it is possible to view the expropriation process as continuing past the point of compensation. A taking might

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[73] Ibid., at 61.

end at the point of compensation, or the process may be ongoing where a proprietary element remains in the Crown, as in this case.

Indeed, Canada suggests as much in its admission that the Crown had discretion over the right of way after the line was abandoned: "the power to re-establish the subject lands as reserve remained within the discretion of the Governor in Council. Such discretion was not exercised in favour of the Band in this case, excepting with respect to the parcel re-acquired out of Band funds."[74] Mr. Becker was asked during oral argument whether this discretion would give rise to a fiduciary duty. He replied that it would not because the Crown has a discretion over any land that it owns, and it cannot be reasonable to suggest that Canada thus has a fiduciary duty to turn all Crown land into reserve land.[75]

We find this answer unsatisfactory because it ignores the context and the history of the subject lands. The right of way was once reserve land, so it is not like all other Crown land. The special status of reserve land reflects the historic responsibility that the Crown has assumed toward Indian lands. In the case of an appropriation, the protection generally afforded reserve land is superseded by a greater public purpose, and the lands are taken from the reserve on that basis. The Crown has ended up with discretion because it consented to reserve lands being taken for public purposes, and those purposes have come to an end. In other words, it is through its intermediary role in dealings with reserve lands that the Crown acquired discretion and control over the right of way at issue here.

Is this a sufficient basis for a fiduciary duty? Mr. Becker says no: there must

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[74] Submission on Behalf of the Government of Canada, p. 17 (ICC Exhibit 8).

[75] ICC Transcript, pp. 204-05.

be some ongoing Indian interest, some "corpus" on which to base the fiduciary duty. We note that this characterization of the threshold for a fiduciary duty uses the language of trusts. But in *Guerin*, the Supreme Court of Canada emphasized that trust principles were not applicable to the relationship between the Crown and aboriginal peoples with respect to reserve land. Mr. Justice Dickson (as he then was) addressed this point as follows:

> . . . the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of surrender. . . . An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision [*Smith v. The Queen*, [1983] 1 S.C.R. 554] makes clear, *upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although *the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation*, neither an express nor an implied trust arises upon surrender.[76] [Emphasis added.]

It is clear, therefore, that there is no need for a trust corpus. In *Guerin*, there was a fiduciary duty on the Crown even though *the Indians' right in the land had disappeared.*

The principles of fiduciary law articulated by the courts give rise, in our view, to the following proposition: if reserve land taken for public purposes is no longer used for those purposes and may be restored to the Crown, the Crown thereby has

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[76] Note 71 above, at 386.

a discretion over the land, and a fiduciary obligation takes hold to regulate the exercise of that discretion.

Whether the fiduciary obligation was met will depend on the particular facts of each case. Based on the facts here, we find that the Crown breached its fiduciary duty to the Sumas Band. It is clear that in this case the taking of reserve land resulted in substantial harm. The right of way took up a large portion of a very limited area of valuable land and cut the remainder of the reserve into two. The Department of Indian Affairs was fully cognizant of this harm, and of the likelihood of further harm if the land was alienated to third parties.

We heard from the Sumas people about the effect of the appropriation on their community. They spoke of the way that the alienated portion impedes residential development on the reserve, and told us of their concerns about living in the midst of a plastics manufacturing operation. Their evidence confirms what was apparent to the Department of Indian Affairs in 1927: the "bad severance," the limited amount of useful land on the reserve, and the possibility that "complications might arise if a white man enters into occupation of the strip in question." We want to emphasize that we are not relying on hindsight for our finding that the Crown should have exercised its discretion to restore the right of way to the Sumas Band. It is simply that the problems evident 65 years ago endure.

Another fact to consider is that the Sumas Band wanted the right of way restored to the reserve, and this was communicated to Indian Affairs. Chief Ned wrote to the Indian Agent in 1927 to request that the right-of-way lands be returned to the Band. He had learned that VV & E was no longer using the land for its railway, and he did not want VV & E to sell to third parties and thus to have white

men living on the reserve.[77] In fact, that portion of the right-of-way land that was not reacquired by the Sumas Band is occupied by non-Indians, and has been ever since it was sold by VV & E.

We have also considered the matter of compensation in the context of the Crown's discretion to restore the land to the Band. We appreciate that the Band received full compensation for the right-of-way lands, but we are of the view that this is not a factor to be taken into account in assessing the Crown's exercise of discretion here. In other words, there is no issue of double compensation. The Band received compensation only for VV & E's exclusive use of the right of way as long as it was used for railway purposes. As we see it, the railway company took the risk of having the interest terminated at an early point.

In our opinion, therefore, the Crown was under a fiduciary obligation to restore the right of way to the Sumas Band when it learned that the right of way would no longer be used for railway purposes. After the rail line was abandoned, Indian Affairs' only action was to allow the Band to purchase an 8.58-acre portion of the right of way, which amounted to allowing the Indians to buy back what was already legally theirs. Such action was insufficient to discharge the Crown's fiduciary obligation to the Sumas Band.

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[77] Indian Agent Daunt later wrote to Indian Affairs to explain why the Sumas Band was going to reacquire only 8.58 of the 12.08 acres sold to Sam Maclure (note 40 above). Agent Daunt stated that the 3.5 acres "was not desired by the Indians." During oral argument, the issue arose as to whether this, or the letter from Chief Ned asking for the entire right of way, accurately represented the Band's desires. In our view, this letter is evidence that the Band did not want the 3.5-acre parcel *at $40 per acre*. It does not contradict the evidence, found in Chief Ned's letter, that the Band's preference was to have the entire right of way restored.

ISSUE 3: FIDUCIARY DUTY AND THE GRANT TO VV & E

3 If VV & E did acquire absolute title to the right of way, did Canada breach its fiduciary obligation to the Sumas Band by executing the Order in Council or issuing letters patent to the railway company?

The Band submits that, if the company acquired absolute title to the land, as Canada maintains, the Crown breached its fiduciary duty by: (1) failing to protect the interests of the Band in its reserve lands; (2) failing to obtain a surrender before the right-of-way lands were alienated to third parties; and (3) failing to ensure that the documents executed by the Crown provided for the right of way to revert to the Band. In other words, even if we assume that an absolute taking was consistent with the *Railway Act*, Canada nevertheless had an obligation to grant to VV & E only that interest required for the purposes of running a railway.

As we understand it, the Band is asserting that the Crown breached its fiduciary duty not by consenting to VV & E's acquisition of a right of way, but by allowing the Band's interest to be divested entirely. Although the appropriation was not in the best interests of the Sumas Band, the Crown was under an obligation to consider the larger public interest as well, and the extent to which that interest would be furthered by the taking.[78] The fact that the right of way took a very large area from the best part of the reserve is a cause for concern, but the Band did not argue that, for example, consenting to VV & E's taking an easement across the reserve would have amounted to a breach of fiduciary duty. According to the Band, the

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[78] See *Kruger*, note 70 above, at 42-43, per Urie J., quoting with approval the reasons of the trial judge.

breach of duty arose in granting title to the right-of-way lands to VV & E.

Canada's rejoinder is that the Band consented to the taking and was paid full compensation. Furthermore, once the Governor in Council gave its consent, the *Railway Act* became operative and the right of way was taken in accordance with the provisions of that statute (the assumption for the purposes of this issue being that an absolute taking was consistent with the *Railway Act*). Canada maintains that, whatever the effect of the Act, the Crown no longer had any discretion on which to base a fiduciary duty. The issuance of letters patent to the railway company flowed from the Act.

Canada is right only if the Governor in Council had no discretion. This in turn would be the case only if the *Railway Act* mandated that the railway company acquire absolute title to any land taken. In our view, that is not so: section 172 allows the Governor in Council to give consent "upon such terms as the Governor in Council prescribes." This confers on the Governor in Council a discretion to place conditions on the appropriation, including a condition that the land revert to the Band upon discontinuance of the railway. Therefore, we reject Canada's argument.

Was there a breach of fiduciary duty in the failure to exercise this discretion to grant less than the full fee simple? The Crown had an obligation to consider the public interest in a railway, as well as the interests of the Sumas Band. An expropriation of land will not be in the best interests of a Band; therefore, a "best interests" standard is not applicable. In our view, the obligation on the Crown in this context is to do as little injury as possible to the Indians' interests. The public interest could have been satisfied by a grant of a right of way as long as the land was needed by the railway. Any grant beyond that did not further the public purpose, and

was nothing more than a gratuitous disposition of Indian lands in favour of the railway company. We thus find that, if the letters patent were effective to transfer absolute title to VV & E, the Crown failed in its fiduciary duty by granting the right-of-way lands without a railway-purposes limitation.

The Band's consent to the sale of the right of way to VV & E, contained in the Band Council Resolution, does not alter this conclusion. In our view, given the role of the Indian Agent in the lives of the Sumas people at that time, and the lack of any independent legal advice for the Band, the appropriation process was fundamentally non-consensual. Nor does the fact of adequate compensation relieve the Crown of its fiduciary duty. The Crown had an obligation to ensure that the Band was compensated for the loss of its land and improvements for the duration of the grant, as well as an obligation to place a limitation on the grant.

We cannot agree, however, that the Crown breached its fiduciary duty in failing to obtain a surrender before the land was alienated to third parties. As discussed above, a surrender and a taking are different processes. Furthermore, the surrender provision in the *Indian Act*,[79] section 48, provides that "except as in this part otherwise provided" no reserve shall be alienated, etc., without a surrender. What is included "in this part" is the expropriation provision, section 46. In *Kruger*, the Court undertook this same analysis and all three judges concluded that compliance with the surrender provisions of the *Indian Act* is not required when reserve lands are expropriated under the equivalent to section 46.

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[79] RSC 1906, c. 81.

ISSUE 4: THE VALIDITY OF THE ORDER IN COUNCIL

4 In the alternative, was the Order in Council valid only for the taking of the 41.95-acre parcel as set out in the original plan of right of way, and did Canada therefore breach section 46 of the *Indian Act* by failing to obtain the consent of the Governor in Council for the taking of 28.83 acres of IR No. 6?

The position of the Band is that the taking was not authorized because the Governor in Council consented to the appropriation of the larger 41.95-acre right of way, not the 28.83-acre parcel. The principle of protection of Indian lands, which underlies the requirement for Governor in Council consent, means that the Governor in Council must consider the specifics of each application for an expropriation of reserve land. The Band cites *St. Ann's Island Shooting and Fishing Club Ltd. v. R.*[80] in support of the assertion that Governor in Council authorization is a strict requirement.

Our difficulty with this argument is that the 28.83-acre right of way was included in the original 41.95-acre plan for which the consent of the Governor in Council was obtained. The right of way was simply reduced in width; there were no other changes to the plan, and no other circumstances changed to affect the substance of the taking. It is reasonable, in our view, for the original consent to operate for the taking of a smaller, included area. In other words, the original consent included consent to the taking of any portion of the 41.95 acres.

The Band argues that the reduction in the width of the right of way might have aroused suspicion in the Governor in Council about whether the land was really

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[80] [1950] SCR 211, DLR 225.

required for railway purposes, and that this might have affected the Governor in Council's decision to consent to the reduced area if such an application had been placed before it. Since the suggestion that the railway acted with improper motives was not established, we decline to consider this argument.

We are also of the view that the *St. Ann's Shooting and Fishing Club* case does not assist the Band. In that case, the Supreme Court of Canada held that an Order in Council consenting to the surrender and lease of reserve lands did not authorize Indian Affairs to enter into further leases of the same land. But the rationale was not a technical one: as Mr. Justice Taschereau stated, the Order in Council cannot "be construed in my opinion as authorizing the Superintendent at the expiration of the lease, to enter into fresh agreements with the appellant nearly fifty years later, and in which can be found different conditions."[81] The efficacy of the original consent was exhausted by the expiration of the original lease, the passage of fifty years, and the change in circumstances over that period. None of these factors, or anything similar, applies to the taking of the right of way here. The Order in Council was dated August 1, 1910, and the new plan of right of way was forwarded to Indian Affairs on October 29, 1910. There is no evidence that anything changed materially in this intervening period so as to take the new plan outside the confines of the original application.

For these reasons, we find that the consent to the taking was valid.

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[81] Ibid., at 216.

PART V

CONCLUSIONS AND RECOMMENDATION

CONCLUSIONS

This Commission has been asked to inquire into and report on whether the claim of the Sumas Band discloses an outstanding lawful obligation on the part of the federal government. We have given careful consideration to a number of specific legal issues concerning the taking of the railway right of way across the Sumas reserve. The issues are complex, but the essence of the matter is whether the Band retained any legal interest in the right of way, and whether Canada had any obligation to have the lands restored to the Band when the railway discontinued its line. Our conclusions are summarized below.

The Effect of the Taking

- The legal interest the railway company acquired when it appropriated the right of way was a fee simple *as long as the lands were used for railway purposes*. The *Railway Act* allowed a railway company to appropriate land held by the Crown, including reserve land, if that land was required for railway purposes. A further stipulation in the *Railway Act* was that the company could not sell or otherwise alienate any appropriated Crown land. Thus, by statute the company could take only a limited property interest in the reserve.

- The Band and Canada retained a reversionary interest in the right of way. This means that, when the land ceased to be used for railway purposes, it

should have been returned to the original owner – the Crown for the use and benefit of the Indians. There is nothing in the *Railway Act* to suggest that the Indian interest in reserve lands may be taken absolutely while the Crown's interest in its ultimate or underlying title is preserved.

- The Governor in Council did issue letters patent to VV & E, which purport to grant to the company full and absolute ownership of the right of way. But the letters patent could not give VV & E absolute ownership of the right of way when the *Railway Act* permitted the company to take land only to operate a railway, and prohibited the company from selling or otherwise alienating such land. Therefore, the conditions of use for railway purposes and inalienability must be read into the grant to make it consistent with the statute.

The Obligation of the Crown on Abandonment of the Line

- When the right of way ceased to be used for railway purposes, Canada had a fiduciary duty to protect the Indians' reversionary interest, or, in other words, to ensure that the land was restored to reserve status. By failing to do so, Canada breached its fiduciary duty to the Sumas Band.

- Even if the taking resulted in the termination of the Band's interest in the right of way, as Canada asserts, the Crown had a fiduciary obligation to the Sumas Band to restore the lands for its use and benefit. If the Indian interest was extinguished, then the reversion was in the Crown, giving the Crown discretion over the subject lands when the railway ceased to use the right of way. A fiduciary obligation, derived from the historic responsibility that the

Crown has assumed toward Indian lands, took hold to regulate the exercise of that discretion. Although Indian Affairs allowed the Band to repurchase 8.58 acres of the right of way, such action was insufficient to discharge the Crown's fiduciary duty.

The Letters Patent and the Crown's Fiduciary Obligation

- Assuming that the taking did extinguish the Band's interest in the right of way (if the letters patent were effective to transfer full ownership to the railway company), the Crown breached its fiduciary duty to the Band in failing to transfer to VV & E only that interest necessary to operate the railway. The Crown had an obligation to do as little injury as possible to the Indians' interest in the reserve, and the public interest in having an effective rail system could have been satisfied by a grant with a railway-purposes limitation.

The Validity of the Order in Council

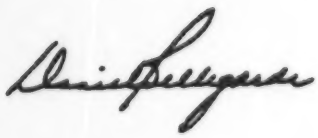
- The Order in Council, through which the Governor in Council consented to the taking of the 41.95-acre parcel set out in the original plan of right of way, was valid for the taking of the included 28.83-acre parcel.

RECOMMENDATION

Having found that Canada failed by all accounts to meet its fiduciary obligations to the Sumas Band, we recommend:

> **That the claim of the Sumas Band be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commission Co-chair

P.E. James Prentice, QC
Commission Co-chair

Carole T. Corcoran
Commissioner

February 1995

APPENDIX A

THE SUMAS INQUIRY

1 Decision to conduct inquiry — January 20 and 21, 1994

2 Notices sent to parties — January 24, 1994

3 Planning conference — March 18, 1994

A planning conference was held in Vancouver with representatives of the Sumas Band, Canada, and the Commission. Matters discussed included the scope of the Inquiry, dates for the community session and legal argument, and other matters related to the conduct of the inquiry.

4 Community session — September 23, 1994

The Commissioners heard from the following members of the community: Chief Lester Ned, Hugh Kelly, Larry Ned, and Kenneth Ned. The session was held on the Sumas reserve.

5 Legal argument — September 23, 1994

Legal arguments were made in the community immediately after the testimony of the community members.

6 Content of the formal record

The formal record for the Sumas Inquiry consists of the following materials:

- Documentary record ("History of the Sumas Indian Band" and 3 volumes of documents)
- Exhibits
- Transcripts of oral submissions (1 volume, including the transcript of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record of this Inquiry.